

INDIANA DEPARTMENT OF TRANSPORTATION

Disadvantaged Business Enterprise Program Manual

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October 29, 2008**

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I. GENERAL

A. Issuing Agency: Indiana Department of Transportation
100 North Senate Avenue
Indianapolis, Indiana 46204-2217

B. Effective date: August 22, 2008

C. Statutory Authority

This DBE program applies to federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Equity Act for the 21st Century (TEA-21), and by the Safe, Accountable, Flexible, Efficient Transportation Equity Act a Legacy for Users (SAFETEA-LU). It also applies to federal transit funds authorized by Titles I, III, V, and VI of ISTEA, or by federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21. The program applies to airport funds authorized by 49 U.S.C 47101, et seq. USDOT's legal authority for 49 CFR Part 23 (as amended) and Part 26, include various Executive Orders, 23 U.S.C. 324, 42 U.S.C. 2000d *et seq.*, and 49 U.S.C. 1615, 47107, 47113, and 47123.

D. Definitions

This DBE Program incorporates as though fully set forth herein the definitions of terms included in 49 CFR Sections 23.5 and 26.5. In addition, the following are definitions of terms used by INDOT in conjunction with this DBE Program.

- **ACDBE:** Airport Concessionaire Disadvantaged Business Enterprise is a firm that is certified by INDOT as an airport concession, pursuant to the requirements set forth in 49 CFR Part 23.
- **AAC:** Affirmative Action Certification is a certified document signed by the prime contractor or prime consultant, and submitted with its bid at a construction contract letting or with its consultant contract letter of interest in response to a Request for Proposal (RFP) that lists the DBE firms it intends to use to achieve the contract goal. The AAC requires the name of the DBE, the type of service the DBE will perform by line item, if applicable, and planned contract percentage committed to each DBE firm. The AAC requires the identification of DBE firms used for race-conscious and race-neutral participation.
- **ALJ:** Administrative Law Judge is a deputy attorney general from the Indiana Office of Attorney General appointed by the Commissioner to hear and decide DBE revocation of certification appeals prior to appeals to DOT.
- **Bidder's List:** A list maintained by INDOT that provides as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors that seek work on INDOT federal-aid contracts.

- **Certification Review Committee:** A group that consists of all Certification Specialists, Certification Coordinator, Certification Manager, Administrative Assistant and Director that makes DBE certification determinations based on documentation and recommendation of investigator.
- **CUF:** Commercially Useful Function, a requirement for all INDOT projects. A DBE firm performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved as further defined in 49 CFR 25.55.
- **Commissioner:** the INDOT Commissioner, or designee.
- **Consultant:** an individual or firm participating as a prime or subcontractor in an INDOT professional services project.
- **Contract Administration Division:** the INDOT division that is responsible for construction and consultant contract administration.
- **DBE-3 Form:** officially entitled the INDIANA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE UTILIZATION AFFIDAVIT, this form is a document signed by both the prime contractor and DBE subcontractor at the end of a project that attests that the percentage of the contract committed to the DBE subcontractor in the AAC has in fact been paid to the DBE subcontractor.
- **DBE Codes:** the codes created by INDOT to identify the primary business of a DBE firm and to assist prime contractors in locating DBEs to meet contract goals as set forth on the INDOT DBE website: http://www.in.gov/indot/files/DBE_Codes.htm
- **DBE Directory:** the alphabetical listing of DBE firms certified in the State of Indiana found on the DBE website: http://www.in.gov/indot/files/dbe_list.xls
- **Director:** the Director of the Economic Opportunity Division of the Indiana Department of Transportation.
- **Districts:** the six main geographic areas of operation outside of INDOT Central Office: Crawfordsville, Fort Wayne, Greenfield, LaPorte, Seymour, and Vincennes.
- **EOD:** the Economic Opportunity Division of the Indiana Department of Transportation.
- **Equal Employment Opportunity (EEO) Officer:** the INDOT employee in each of the six Districts who monitors DBE and EEO compliance on INDOT jobsites.
- **IC-730:** the INDOT form that is used at the District level to approve all subcontractors participating in an INDOT construction project. An IC-730 is not

required for a lease or rental agreement between a prime contractor and a hauler or material supplier.

- **INDOT:** the Indiana Department of Transportation.
- **Joint Checks:** a two-party check between a DBE, a prime contractor and the regular dealer of material/supplies.
- **LOI:** Letter of Interest a professional services firm submits to INDOT in response to a Request for Proposal that evidences interest in being selected as a prime. The LOI must include all proposed subcontractors and the Affirmative Action Certification if there is a DBE goal.
- **LPA:** a Local Public Agency such as a city or county that is typically a subrecipient of federal funds passed through INDOT.
- **MPO:** Metropolitan Planning Organization that typically is a subrecipient of federal funds passed through INDOT.
- **NAICS Code:** the 2007 North American Industrial Classification System Code that INDOT assigns to each DBE depending on the type of work the firm performs or seeks to perform on an INDOT contract. The NAICS Code designations are set forth on the following website:
<http://www.census.gov/epcd/naics07/index.html>
- **Prequalification:** A certification required for most contractors and consultants doing business with INDOT, verifying that they have the qualifications necessary to do business with the State. INDOT has a Prequalification Engineer who considers a firm's financial position, equipment, experience, personnel and any other relevant information in approving prequalification and setting prequalification limits. See Prequalification requirements for contractors: <http://www.in.gov/indot/7179.htm>. Prequalification requirements for professional services: <http://www.in.gov/dot/div/legal/rfp/consultants/CPQM.pdf>
- **Prequalification Committee:** the seven-member (five voting members) INDOT Committee that reviews contractor and consultant qualification in accordance with 105 IAC 11-2-1(f) of the Indiana Administrative Code (Rules for Prequalification of Contractors and Bidding). The Director serves as a voting member of this committee
- **Program:** this DBE Program as set forth herein.
- **RFP:** Request for Proposals. A process used in instances in which INDOT must make a contract award (typically consultant) by undergoing a qualification-based selection process as opposed to basing contract award on low bid.
- **Site Manager:** [an integrated series of electronic forms for entering and viewing all information needed for a contract—from the planning stage to the archival](#)

stage. The information entered on these forms is then stored in a central database. SiteManager gives state DOTs the ability to maintain a unified entry point for contract data, as well as provide the most up-to-date information to all users.

- **Subrecipient:** any entity, public or private, to which DOT financial assistance is extended by and through an INDOT program.

E. GUIDANCE AND INTERPRETATION

INDOT acknowledges that only guidance and interpretations consistent with 49 CFR Part 26 and 23, issued after March 4, 1999, have definitive and binding effect and constitute the official position of the U.S. Department of Transportation. INDOT further acknowledges that guidance and interpretations are valid and binding only if they are issued over the signature of the Secretary of Transportation or contain the following statement: “The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.”

F. RECORD KEEPING

1. **Bidder’s List:** INDOT Contract Administration Division maintains a bidders’ list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. Firms working under an INDOT contract are required to submit this list pursuant to section 103.02.1 of the INDOT Construction Contract’s Recurring Special Provisions.
2. **Subcontract Payment Tracking (SPT):** A tracking system that allows prime contractors with active INDOT contracts a means to report payment information made to assigned subcontractors online. The data collected is used for two primary purposes. First, the system will help to ensure that INDOT prime contractors comply with the ten (10) day payment provision in all INDOT contracts in accordance with INDOT Recurring Special Provision 100-C-151c. Second, the data will help to ensure compliance with the Disadvantaged Business Enterprise (DBE) Program provisions in federal aid INDOT contracts in accordance with 49 CFR § 26.29.. <http://www.in.gov/indot/div/legal/dbe/spt.htm>
3. **DBE Trucking Reports:** INDOT, pursuant to Recurring Special Provision 100-C-151b, requires all DBE haulers participating on INDOT contracts to submit weekly trucking reports. The reports are completed by the DBE hauling firms, and record the payments received from the prime and the distribution of payments the DBE hauler makes to the haulers that it uses to supplement its fleet. The reports are submitted by the DBE haulers monthly directly to INDOT EOD. EOD then tracks these reports through an internal database. The trucking forms are accessible from the following website:
<http://www.in.gov/indot/div/legal/dbe/pubs/DBETruckingReport.pdf>
4. **CUF Reports:** In partial fulfillment of its responsibilities to monitor DBE commercially useful functions, pursuant to 49 CFR 26.55 (c), INDOT requires all INDOT District EEO Officers to monitor DBE utilization on all INDOT project sites for compliance with commercially useful function (CUF) requirements. The EEO Officers submit completed CUF Compliance Review Forms to EOD monthly where they are evaluated for any need for further investigation.

5. **IC-730 Form:** INDOT requires prime contractors to submit INDOT form IC-730 “Request for Approval of Subcontractor” for every subcontractor (including DBE subcontractors) used on an INDOT project. The form is used to evaluate the percentage of prime contractor contract participation as well as to ensure that subcontractors are not performing beyond their prequalification limits. District EEO Officers and District administrative staff review each form for approval and send hard copies to INDOT for entry into an INDOT database that can be used to create reports.
6. **DBE-3 Form:** INDOT requires all contractors to complete a DBE-3 form, prior to contract closeout. The DBE-3 form must be signed by both the prime and DBE subcontractor, verifying that the latter has received all payments due under the contract as committed in the Affirmative Action Certification. INDOT monitors the forms to ensure that actual payments reflect the commitment at the contract’s award and any approved participation changes during the contract’s performance. Should the DBE-3 form indicate that the DBE subcontractor received less than was committed on the Affirmative Action Certification, INDOT requests a written explanation by the prime contractor before final payment is released. This document is reviewed by the EOD Compliance Section to determine if any payment shortage was a result of the prime contractor’s bad faith. If EOD determines that the discrepancy in payment was not the result of a good faith contract variance or other legitimate reason, final payment may not be made to the prime contractor and EOD will notify INDOT Prequalification Committee for review and possible sanction. The DBE-3 form will soon be required for all DBE utilization, whether or not a contract has a DBE goal, in order to capture race-neutral utilization.
7. **Affirmative Action Certification (AAC):** INDOT requires all prime contractors and consultants to submit, at the time of bid letting or submittal of an LOI, an Affirmative Action Certification on which they verify DBE subcontracting or subconsulting commitments to specific DBE firms. The Affirmative Action Certification records dollar amounts and contract percentage commitments to DBE firms by a prime contractor or consultant and includes a space for both race-conscious and race-neutral utilization. This commitment data is entered into INDOT’s LAS system for tracking throughout the life of the contract. It is also used at the close of the contract to compare actual pay to commitments.
8. **Site Manager:** INDOT IT has worked with EOD so that with the implementation of the Site Manager Data Collection System, INDOT can track DBE utilization, both commitments and attainment on construction contracts.

G. ASSURANCES

Each financial assistance agreement INDOT signs with a DOT operating administration (or a primary recipient) and each federal-aid contract INDOT signs with a prime contractor includes all assurances required under 49 CFR 26.13. Further, INDOT contract provisions require that each of its prime contractors include these assurances in each contract pertaining to an INDOT project the prime executes with a subcontractor.

II. ADMINISTRATION

A. DBE LIASION OFFICER

The Commissioner appointed the Director of the EOD as the DBE Liaison Officer for the agency. The EOD Director reports directly to INDOT's Chief Legal Counsel/Deputy Commissioner on matters pertaining to the DBE Program, but has independent access to the Commissioner. The EOD has the responsibility for staffing, administering, and managing the DBE program in accordance with 49 CFR Parts 26 and 23. The specific duties of this position that pertain to the DBE program include but are not limited to:

1. Developing and updating INDOT's DBE Program for approval by the Commissioner and FHWA.
2. Calculating INDOT's annual DBE goal and setting individual contract goals in a manner that is narrowly tailored to meet the Program's objectives.
3. Certifying applicant firms that fully meet the DBE eligibility standards as set forth in 49 CFR Parts 26 and 23.
4. Administering appeal procedures for certification denials and revocations.
5. Maintaining sufficient staff to administer the DBE program.
6. Serving as a point of contact for District EEO Officers, providing them with guidance concerning DBE compliance.
7. Serving as the agency liaison and public relations officer with the DBE community, contractors, consultants and other agencies concerned with the DBE Program.
8. Assisting with agency procedures and contract specifications that pertain to the DBE Program.
9. Assisting DBE firms with problems and developing potential solutions to those problems.
10. Providing and administering DBE supportive service programs for firm development and marketing to increase DBE firms' competitive capabilities.
11. Disseminating information on the opportunities available to DBE firms to participate in INDOT contracts.

12. Informing INDOT's prime contractors and consultants of their obligations relative to the DBE Program.
13. Monitoring INDOT DBE contract compliance.
14. Ensuring that INDOT contract provisions pertaining to the DBE Program are included in all contracts and consistent with 49 CFR Part 26.
15. Working cooperatively with other INDOT divisions to ensure interdisciplinary INDOT compliance with DBE Program requirements.
16. Keeping INDOT knowledgeable of any federal changes to the Program.
17. Identifying the DBE Program's progress and deficiencies and making recommendations to correct any identified deficiencies.

B. FINANCIAL INSTITUTIONS

INDOT will use its best efforts to identify, annually, services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals within the state and make reasonable efforts to use these institutions or encourage their use by prime contractors.

C. PROMPT PAYMENT

INDOT Construction Contract Recurring Special Provision Section 109 requires a contractor to make payment to all subcontractors for the value of work performed and materials in place within 10 business days of receipt of INDOT payment for the corresponding estimate.

Subcontractor payment tracking information submitted by primes are used to monitor prompt payment to all INDOT subcontractors. Specifically, EOD Compliance Section will choose ten INDOT contracts to review for prompt payment compliance. EOD also responds to any allegations of late or insufficient payment with investigation and remedial action. Should INDOT determine that a prime contractor consistently makes late payments to its subcontractors without the written approval of INDOT, the prime contractor will be referred to the Prequalification Committee for review and possible sanction. Sanctions may include suspension, the reduction of prequalification limits, and prequalification revocation.

D. RELEASE OF RETAINAGE TO SUBCONTRACTORS

INDOT does not hold retainage on its contracts, but does not object when prime contractors hold retainage on its subcontracts. INDOT contracts, pursuant to Recurring Special Provisions, section 100-C-151(b), require prime contractors to release to the subcontractors any portions of retainage held within 30 calendar days after satisfactory completion of the work is performed by the subcontractor. For the purposes of this section, satisfactory completion is interpreted as occurring when the subcontractor has completed all physical work and other contract requirements to INDOT's satisfaction, including the submission of all submittals required by the contract specifications and the

Department to INDOT's satisfaction. The subcontractor payment tracking set forth herein requires the prime contractor to report all retainage held and released per month. This information is reviewed by random selection monthly.

E. DBE DIRECTORY

INDOT has recently implemented an online Disadvantaged Business Enterprise Repository is a searchable database designed to

- Assist prime contractors in identifying Disadvantaged Business Enterprises (DBEs);
- Provide a summary of the type of service each DBE provides;
- Provide contact information for DBEs certified in the State of Indiana;
- Assist the public in determining whether a business is certified with the State of Indiana as a DBE or an Airport Concession Disadvantaged Business Enterprise (ACDBE). The new repository is searchable by firm name, type of work, geographical preference, NAICS, and DBE Codes.

The current database is updated at least twice weekly by the Certification Coordinator in partnership with INDOT web staff. The listing for each DBE firm lists its address, phone number, email, and the types of work the firm has been certified to perform as a DBE.

F. OVERCONCENTRATION

INDOT DBE Liaison and Division advisor reviews DBE utilization contrasted to non-DBE utilization on three common DBE work items, annually, to determine if there is an over-concentration in a certain type of work that unduly burdens the contracting opportunities of non-DBE firms.

Should INDOT note any DBE overconcentration, the EOD will consult with FHWA as to any appropriate measures to be taken, such as assisting DBE firms in performing work in other areas or varying its use of contract goals, to the extent consistent with 49 CFR Section 26.51 to ensure that non-DBEs are not unfairly prevented from competing for subcontracts in certain work specialties.

G. BUSINESS DEVELOPMENT PROGRAM

1. **General:** INDOT provides business development for its certified DBE firms through its Supportive Services Section. The EOD has a Supportive Services Manager who organizes DBE programs. The Supportive Services Manager surveys DBE firms annually to determine common concerns and programming requests as a basis for specific program development.
2. **EDI:** INDOT provides DBE firms with the technical, managerial, technological, and financial management skills that are necessary for a business to become more successful, self sufficient, and competitive with non-DBE firms through its Indiana Entrepreneurial Development Institute (EDI). The EDI curriculum is substantially based on information and statistics generated through previous programs, as well as communication and contact with previous participants and the general DBE community regarding the technical assistance needed for Indiana

DBE firms. INDOT also includes business training aimed at DBE professional service or consulting firms within this program.

3. **SINDI:** INDOT is intensifying business development efforts on existing and potential DBE firms located in the southern half of the State of Indiana through the Southern Indiana DBE Initiative (SINDI), where the demand for DBE participation exceeds firm availability. INDOT is identifying underperforming DBE firms located in the southern half of the state as well as existing minority and women owned businesses that are not currently DBE certified. Once identified, those firms not certified will be encouraged to obtain DBE certification. Underperforming DBE firms will be offered business development training.
4. **Bid Express:** INDOT has contracted with an outside consultant, INFO-TECH, to provide an electronic bidding service, “Bid Express,” for use in its conversion to electronic bidding. INDOT purchased the Small Business Networking Program which allows DBE firms to make web-based connections with prime contractors to offer and receive subcontracting quotes pertaining to specific INDOT construction contracts. INDOT purchases Bid Express accounts for all interested DBE firms.
5. **Future:** INDOT is open to creating new Supportive Services programs in the future. As such, INDOT has initiated two focus groups for DBE construction and DBE consulting firms that meet with EOD quarterly to discuss needs and communicate successes and barriers to success.

H. MONITORING DBE PROGRAM PARTICIPATION

INDOT monitors DBE Program participation from letting to contract finalization in its Contract Compliance Section that is staffed with one Compliance Manager and three Compliance Specialists. DBE utilization is monitored throughout the year with reference to the annual goal to measure attainment thereof. The EOD’s Certification Section conducts any investigations required for existing DBE firms resulting from external complaints or internal concerns regarding continued DBE eligibility.

1. DBE Participation Review

EOD’s Contract Compliance Section reviews all bids prior to award for compliance with any DBE contract goal by reviewing the AAC submitted by the prime with its bid at the INDOT letting. INDOT requires all contractors and consultants to complete an AAC on which they verify DBE subcontracting or subconsulting commitments to specific DBE firms. The AAC records dollar amounts and contract percentage commitments to DBE firms by a prime contractor or consultant. The prime contractor may not terminate for convenience a DBE subcontractor, used on a race-conscious basis, on its AAC (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without INDOT’s prior written consent. The written consent, if issued, must come from EOD Central Office. District EEO approval is not sufficient. If, however, a DBE subcontractor is terminated with INDOT EOD approval, or fails to complete its work on the

contract for any reason, INDOT requires the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE firm.

2. DBE Subcontractor Payment Tracking

Subcontract Payment Tracking (SPT): A tracking system required by INDOT contract Recurring Special Provision 100-C-151c. in which prime contractors with active INDOT contracts must report payment information made to assigned subcontractors online. The data collected helps to ensure compliance with the Disadvantaged Business Enterprise (DBE) Program provisions in federal aid INDOT contracts in accordance with 49 CFR § 26.29..

<http://www.in.gov/indot/div/legal/dbe/spt.htm>. The EOD reviews the prime contractors' electronic submissions of its subcontractor payments monthly to ensure that prompt payment is made and to track DBE annual and contract goal attainment. This information is also tracked to monitor DBE goal race-conscious achievement on an ongoing basis so that INDOT can make adjustments to its annual DBE goal if necessary.

3. Non-Compliance Investigations

Whenever INDOT has reason to believe the sub-recipient or a contractor or any subcontractor, supplier, or lessee on a DOT-assisted contract is not operating in compliance with the terms, conditions or requirements of the DBE Program, INDOT will conduct an investigation. First, INDOT contacts the District EEO Office for an initial assessment. If necessary, EOD sends its Compliance Specialists to the field to conduct a more formal investigation. If it is found that the sub-recipient, or the contractor or any subcontractor, supplier or lessee is not in compliance with the DBE Program or contract special provisions, the non-compliant party or parties will be notified in writing. INDOT will then schedule a compliance conference between INDOT and the non-compliant party or parties to discuss the area(s) of noncompliance .

In the event that the non-compliant party or parties fail(s) or refuse(s) to perform in compliance with the DBE Program or contract special provisions, INDOT issues a "Notice of Non-Compliance" to the non-compliant party or parties, depending on the severity of the matter project estimates may be withheld. If the non-compliant party or parties correct(s) the deficiencies, the "Notice of Non-Compliance" will be rescinded. If the deficiencies are not corrected, INDOT will forward all documented non-compliance with DBE requirements to the Prequalification Committee for review. The results of a review may lead to an informal meeting and sanctions in accordance with 105 IAC 11-2-10(e).

5. Commercially Useful Function Monitoring.

District EEO Officers monitor commercially useful function DBE participation at each INDOT jobsite. EOD Contract Compliance monitors CUF at each compliance review.

a. **Red Flags:** The following are considered warning signs, or "red flags" that a DBE is not performing a CUF:

- The work to be performed by the DBE is outside of the DBE's known

experience or capability.

- The DBE provides little or no supervision of the work, the DBE superintendent is not a regular employee of that firm, or supervision is performed by personnel associated with the prime contractor, another business or personnel not under the control of the DBE firm.
- The DBE work force is not under the DBE firm's control and direction or work is performed by personnel normally employed by the prime contractor or another business.
- Any portion of the work designated to be performed by a DBE subcontractor is performed by the prime contractor.
- Any equipment used by the DBE firm belongs to the prime contractor or another contractor with no formal lease agreement, or the equipment signs and markings cover another owner's identity, usually through the use of magnetic signs.
- Materials or supplies necessary for the DBE firm's performance are delivered to, billed to, or paid by another business.
- DBE firm subcontracts or assigns any portion of work to another firm.
- DBE trucking business uses trucks owned by the prime contractor.
- DBE prime contractor subcontracts a greater percentage than the specific contract allows.
- DBE prime contractor only purchases materials and performs little or no work.
- The agreement between the prime contractor and the DBE firm artificially inflates the DBE participation or erodes the ownership, control, or independence of the firm.
- The DBE firm works primarily for only one prime contractor.
- Employees work for both the DBE firm and the prime contractor.
- Inquiries made by INDOT are answered by the prime contractor.
- The DBE firm's owner is not aware of the status of the work or the performance of the business.
- The DBE or prime requests INDOT to write joint checks.

b. District EEO Officer CUF Requirements:

- i. The PE must notify the EEO Officer when DBE will be present on jobsite.
- ii. Routine CUF oversight will occur on every job and EEO Officer will complete a compliance CUF Form and submit copies of these reports to EOD Contract Compliance Section monthly.
- iii. If a routine CUF oversight review reveals a concern, the EEO Officer shall conduct a more in depth review and create a formal report as defined herein that identifies the problem and notify EOD Contract Compliance Section.
- iv. EOD Compliance Section will work with District EEO Officers to conduct an in depth CUF review and create a formal report.
- v.

c. EOD Contract Compliance Specialist CUF Requirements:

- i. When an outside complainant, an EEO Officer, or FHWA alleges a CUF violation or identifies a red flag, the Director may request a Central Office Contract Compliance Specialist immediately to conduct an in depth CUF review and create a formal report with a recommendation.
- ii. Contract Compliance will summarize all monthly CUF activity and provide FHWA quarterly reports.

I. Acceptance of Joint Checks

INDOT allows the use of joint checks under certain circumstances and evaluates written requests by a DBE on a case-by-case basis.

1. INDOT will consider the following factors in determining whether a joint check is allowed:

- a. Whether the manufacturer/supplier has an established policy on requesting joint checks from all firms and the content of the policy.
- b. How often does the manufacturer/supplier request joint checks?
- c. Are there other firms from which the manufacturer/supplier requests joint checks?
- d. Why is the manufacturer/supplier requesting joint checks from the individual DBE firm?
- e. How long will the DBE be required to accept joint checks?
- f. Has the DBE received or when will it receive its payment for the materials?
- g. What is the prime contractor's policy on issuing joint checks?
- h.. Was the joint check requirement issued by the manufacturer/supplier or the prime contractor.

2. INDOT will weigh the factors set forth above in its decision whether to allow a joint check to ensure that the practice does not compromise the independence of the DBE firm nor inhibit its ability to perform a CUF on an INDOT project.

III. DBE GOALS

A. Annual DBE Goal

INDOT determines its annual DBE Goal using the following method:

Step 1 – Base Figure, Section 26.45 (c)

To arrive at its Base figure, INDOT uses the most relevant and reliable data available to provide demonstrable evidence of those DBEs ready, willing, and able relative to all firms in the market area. INDOT's market area is considered to be the State of Indiana and some areas of neighboring states. The data sources INDOT uses are: (1) INDOT's Bidder's List and (2) the active and currently certified DBE construction firms listed in INDOT's DBE Directory.

Step 2 – Adjustments to the Base Figure, Section 26.45 (d)

INDOT considers several factors in determining whether to adjust its Base Figure, as outlined in Section 26.45(d). INDOT considers current DBE certification trends; the median past participation of DBE firms relative to all firms on contracts finalized in the previous five years; overall DBE participation and activity on INDOT federal aid contracts regarding certification and bidding.

Based on the foregoing factors and evidence, INDOT determines whether an adjustment to the Base Figure is appropriate. If so, INDOT averages its Step 1 Base Figure with the adjustment figure above:

Step 3, Projection of Race-Neutral Participation

In accordance with 49 CFR § 26.45(f)(3), INDOT meets the maximum feasible portion of its overall goal through race-neutral means. INDOT's race-neutral initiatives are designed to create a level playing field for DBEs and other small contractors by reducing discriminatory barriers and increasing DBE capacity. While INDOT's current race-neutral efforts will continue in addition to its new initiatives, contract goals are demonstrated as still necessary to ensure non-discrimination and a level playing field for DBEs in Indiana's market area.

B. Federal-Aid Contract Goals

INDOT sets individual contract goals on federal-aid construction, consulting contracts and LPA contracts as a means of satisfying the INDOT race-conscious portion of its annual goal. However, contract goals are only applied on those DOT-assisted contracts that have feasible subcontracting and subconsulting opportunities and certified DBE firms that are certified to perform the pertinent work.

DBE goals may also be placed on construction inspection contracts. This is an exception to setting goals only on contracts in which subcontracting opportunities available.

Race conscious goals are set on construction and consulting contracts with the assistance of the Contract Administration Division, which provides the EOD with a list of work items associated with each contract. EOD Compliance Section evaluates the work items, the typical cost of such work items, the total contract amount, and DBE availability to narrowly tailor a contract's DBE goal.

- Race conscious LPA federal-aid consultant contract goals are set by EOD prior to the LPA issuing an RFP. EOD requires the LPA to provide the following information before it sets a goal: General Description of the Project;
- Identifying Contract Number;
- Total Project Cost;
- Anticipated Cost of Fees;

- Subconsulting Opportunities Typical to Project Type.

EOD retains its own database of race conscious DBE participation commitments in addition to that retained by the agency.

INDOT creates monthly reports to monitor DBE subcontractor payment with the information gathered from prime contractors' monthly subcontractor payment information submissions. These reports allow the EOD to monitor DBE payments in relation to the annual goal and adjust the race conscious goal if necessary.

INDOT examines information reported on its DBE-3 forms submitted by the prime contractor at the end of the contract performance. INDOT monitors the forms to ensure that actual payment reflects the commitment at the contract's award and any approved participation changes during the contract's performance. Should the DBE-3 form indicate that the DBE subcontractor received less than was committed on the Affirmative Action Certification, INDOT requests a written explanation by the prime contractor before final payment is released. This document is reviewed by the EOD Compliance Section to determine if any payment shortage was a result of the prime contractor's bad faith. If EOD determines that the discrepancy in payment was not the result of a good faith contract variance or other legitimate reason, final payment may not be made to the prime contractor and EOD will notify INDOT Prequalification Committee for review and possible sanctions.

IV. GOOD FAITH EFFORTS

INDOT has created the following process and includes the same in its construction contract recurring special provisions Section 103:

A. Good Faith Efforts Process for Construction Contracts

1. Good Faith Effort Reviews at Contract Award:

- a. At an INDOT bid opening, each prime contractor must submit a proposal book together with a completed Affirmative Action Certification that must list each DBE with which it has agreed to subcontract. The Affirmative Action Certification must also list the line item to be contracted and the amount to be paid to the DBE. DBE commitments must be made when the prime contractor submits its bid to INDOT in response to a letting. Primes may not wait until contract award to meet the contract's DBE goal.
- b. If the apparent low bidder has not achieved all or any part of the DBE goal, INDOT will notify the contractor that it has three (3) business days to provide INDOT's Contract Engineer with a written explanation accompanied by supporting documentation of its "good faith efforts" taken to achieve the goal prior to the bid letting. A contractor may still be awarded the contract if it documents that it made adequate good faith efforts to meet this goal. 49 CFR §26.53.
- c. If a contractor provides a response to INDOT's good faith efforts request, the EOD Compliance Section reviews the response, a copy of all proposal books,

and accompanying documentation. After a review, the EOD makes a “fair and reasonable judgment” as to whether or not the bidder made good faith efforts in consideration of “the quality, quantity, and intensity of the efforts that the bidder has made.” The EOD Compliance Section reviews a contractor’s good faith efforts with guidance set forth 49 CFR 26 Appendix A which is incorporated by reference as though fully set forth herein.

- d. The fact that a Prime Contractor used its Bid Express Account with INDOT to locate a suitable DBE could be considered one factor in a good faith effort analysis.
- e. Although there may be some additional costs involved in finding and using DBEs, this is not in itself sufficient reason to excuse a bidder’s failure to meet the contract DBE goal.
- f. If the EOD determines that the contractor demonstrated adequate good faith efforts, the contract will be awarded to the lowest qualified bidder. If the EOD determines that the contractor failed to demonstrate good faith efforts, the EOD shall issue a written memorandum that explains its analysis.
- g. Should the EOD determine that the contractor did not use or document adequate good faith efforts to achieve the DBE goal, the Contract Administration Division will send the contractor a copy of the written memorandum and inform it of its right to an informal hearing.
- h. If the contractor desires an informal review of the decision, it shall send a written request to INDOT. Upon receipt of the request, INDOT will provide the contractor with an opportunity for an informal review of the decision before INDOT’s Deputy Commissioner and Chief Counsel or his or her designee (the “Deputy Commissioner”) who did not participate in the EOD’s decision. The sole issue before the Deputy Commissioner shall be whether the EOD made any material errors of law or fact in its decision, or conducted its process in a manner sufficiently arbitrary or capricious, to support a recommendation to the Commissioner of INDOT contrary to EOD’s decision not to award the contract to the contractor.
- i. The contractor may present any evidence it deems relevant, including but not limited to: affidavits, documents, and testimony of witnesses. The contractor may request INDOT staff to appear and present testimony; and if applicable, the contractor may describe at the informal hearing any relevant information unavailable at the time of the decision that might have affected the EOD’s decision.
- j. After the informal review, the Deputy Commissioner shall make a written finding. If the finding overrules the EOD decision, the contract shall be awarded to the contractor, if otherwise qualified. If the written finding upholds the EOD’s decision, it shall be forwarded to the Commissioner for review.
- k. If after review of the total record, the Commissioner determines that the contractor’s good faith efforts were sufficient, he shall issue a final written

determination that overrules the Deputy Commissioner's decision and orders that the contract be awarded to the contractor (lowest qualified bidder).

1. If the Commissioner determines that the contractor's good faith efforts were insufficient, he shall issue a contract award determination approving the EOD's and Deputy Commissioner's decision, and at the Commissioner's sole option, and without further proceedings, either direct that the contract be awarded to the next lowest, qualified bidder or that all bids shall be rejected and the contract be re-let.

2. Good Faith Efforts Associated with Change Order.

INDOT's DBE program applies to all DOT-assisted contracting, including change orders on contracts that affect the contract DBE goal. INDOT has the following DBE Change Order Policy:

- a. A change order to a contract with a DBE goal shall be considered significant if, as a result of the change order, a new item or items of work have been added that result(s) in a new contracting opportunity or opportunities not reasonably related to pay item(s) currently being performed by the prime or any sub contractor ("Significant Change Order").
- b. If there is a Significant Change Order to a contract with a DBE goal, the prime contractor must hire or make good faith efforts to hire a DBE firm to perform the work.
- c. If, as a result of a change order, work has been added to a contract with a DBE goal that involves or is related to pay items of work that was committed to a DBE firm, whether or not counted toward the DBE goal, the prime contractor shall offer that same DBE firm the opportunity to perform the additional work. The prime contractor shall consider other DBE subcontractors if the additional work puts the original DBE firm over its prequalification limits, although INDOT may consider an exception to the prequalification limits on a case-by-case basis. In any case, if the DBE firm is unable to perform the additional work, the prime must make good faith efforts to hire an alternate DBE firm to perform the work.
- d. If, as a result of a change order, work has been added to a contract with a DBE goal that involves or is related to pay items subcontracted to a non-DBE subcontractor, the non-DBE subcontractor may perform the additional work. The prime contractor may have to consider other subcontractors if the additional work puts the original subcontractor over its prequalification limits, although INDOT may consider an exception to the prequalification limits on a case-by-case basis.
- e. If, as a result of a change order, work has been added to a contract with a DBE goal, that involves or is related to pay items that a prime contractor is already self-performing, the prime contractor may self-perform the additional work. However, if the prime contractor chooses to subcontract the additional work that results from the change order the change order shall then be considered a

“Significant Change Order,” and the prime contractor must make good faith efforts to hire a DBE firm to perform the work.

- f. The prime contractor shall forward all documentation of its good faith efforts to hire a DBE as a result of a Significant Change Order to the District EEO Officer for review. Contract performance shall not be delayed as a result of a prime contractor’s good faith efforts responsibilities or INDOT’s review thereof.
- g. Should the EEO Officer determine that a prime contractor failed to use good faith efforts to hire a DBE firm as required as a result of a Significant Change Order, this written determination shall be forwarded to the EOD Director for review. If the Director concurs with the EEO Officer’s determination, the prime contractor shall be referred to INDOT’s Prequalification Committee for appropriate action.

3. DBE Directory

Bidders on federally-assisted contracts have the affirmative obligation to consult the list or use other means to ensure that each firm listed on the Affirmative Action Certification is a certified DBE at the time of bid submission. It will not be considered “good faith” if a contractor does not achieve the DBE goal because it lists a firm that is not included on the INDOT DBE Directory. Should a contractor include a firm on its AAC that is not a DBE firm certified in Indiana but is mistakenly included on the INDOT DBE Directory, INDOT will allow the contractor to replace the firm

B. Good Faith Efforts for Consultant Contracts

Consultant services are normally let by the issuance of a Request for Proposals (“RFP”) by INDOT. In an INDOT or subrecipient RFP, EOD may include a DBE goal if reasonable subconsulting opportunities exist and there are qualified DBE firms to perform the type of work. The consultants respond to the RFP by submitting a letter of interest (LOI) that is then ranked by qualification. The consultant with the highest rating is sent to INDOT’s Consultant Selection Review Committee for approval. The approval process includes a determination by the EOD whether the highest rated consultant achieved the DBE goal or demonstrated that it used adequate good faith efforts to do so.

INDOT allows a consultant that has not achieved the DBE goal at the time of the submission of the LOI a three-day period to present documentation of its good faith efforts to do so. INDOT’s EOD will evaluate the information received based upon the same criteria listed above and issue a written determination as to whether the firm made adequate good faith efforts to achieve the DBE goal.

If the EOD determines that the DBE goal was not met but good faith efforts were made, INDOT may proceed with contract negotiations with the consultant.

Conversely, if INDOT determines that good faith efforts were inadequate, INDOT will not proceed with contract negotiations with that consultant. The

consultant is then entitled to the same informal appeal procedures as in the procedure for construction contracts set forth above.

V. COUNTING DBE PARTICIPATION TOWARD GOALS

A. DBE Prime Contractors

When INDOT awards a contract to a DBE as a prime contractor, INDOT will count only that portion of work actually performed by the DBE prime contractor toward its annual DBE goal in addition to any DBE subcontracting work. DBE prime contractors are identified as such in the EOD DBE database. DBE prime contractors are subject to the same DBE subcontracting responsibilities as non-DBE primes.

B. DBE Service Providers

For services, INDOT will count toward DBE goals the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service required for the performance of a contract, provided the fee is reasonable and not excessive, as compared with fees customarily allowed for similar services.

C. DBE Subcontractors

INDOT will count the entire amount of that portion of a subcontract that is performed by the DBE subcontractor's own forces, including the cost of supplies, materials, and equipment leased by the DBE for the work of its subcontract (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

D. DBE Manufacturers

INDOT will count 100% of the value paid for materials manufactured by a DBE which become a permanent part of the project. A manufacturer is a firm that owns and operates the facilities to produce a product required by the contract and purchased by the contractor.

E. DBE Suppliers

INDOT will count 60% of the value paid for materials furnished by a DBE which become a permanent part of the project. A supplier is a firm that sells goods to the general public and maintains an inventory at an owned or leased warehouse or store. A DBE supplier may count 100% of the value paid for material which has been sufficiently altered by the DBE.

F. DBEs that Assist with the Procurement of Materials and Supplies

INDOT will count 100% of the fee or commission received by the DBE for the materials purchased and resold to the contractor that become a permanent part of the project. A facilitator, packager, manufacturer's representative, or other person who arranges or expedites transactions but does not manufacture or supply on a regular basis is not a regular dealer or supplier.

G. Joint Ventures

INDOT has the right to approve or not approve joint ventures with DBE firms. When a DBE performs as a participant in a joint venture, INDOT will count toward its DBE

goal that portion of the total dollar value of the contract equal to the distinct and clearly defined portion of the work of the contract that the DBE either performs with its own forces or subcontracts to, or purchases/leases from another DBE.

H. Commercially Useful Function

Expenditures to a DBE contractor will be counted toward DBE goals only when the DBE is performing a commercially useful function (CUF) on that contract.

It is the responsibility of both the prime contractor and the DBE to ensure that the DBE is performing a CUF. Failure of a DBE to perform a CUF will result in that work not being counted toward the prime contractor's DBE goal. In certain cases it could result in prime or DBE contractor non-payment or ineligibility for future INDOT contracts.

1. Management

The DBE must manage the work that has been contracted. Management includes scheduling daily operations, ordering equipment and materials, preparing and submitting certified payrolls, and hiring and firing employees. All work must be performed with the DBE's own workforce. The DBE owner must supervise daily operations either personally or with a full time, skilled and knowledgeable superintendent. The superintendent must be under the DBE's direct supervision. The DBE owner must make all operational and managerial decisions of the firm.

2. Materials

The DBE shall negotiate the cost, arrange delivery, and pay for the materials and supplies for the job. INDOT or project management staff shall review invoices to determine if they are billed to and paid by the DBE. The DBE must determine the quantity of the material and be responsible for the quality of the material. No credit toward the DBE goal will be given to the cost of materials or supplies paid directly by the prime contractor for the DBE.

3. Employees

The DBE work must be performed by personnel employed and under the control and direction of the DBE firm. These include employees of the DBE or those recruited through the traditional recruitment or employment centers available. To be considered independent businesses, DBEs shall keep a regular workforce. DBEs shall not share employees with non-DBE contractors, especially the prime contractor. The DBE firm must be responsible for all payroll and labor compliance requirements for all employees within the control of the firm and is expected to prepare and finance the payrolls.

I. Trucking

1. Preconstruction Requirements

- a. For any INDOT contract involving trucking ("Contract"), at the preconstruction conference (or for those situations where the preconstruction conference is held several weeks prior to the start of construction, within a

reasonable time after the preconstruction conference, but at least five days before work begins), the general/prime contractor (“Contractor”) shall provide the INDOT PE/PS with a list of trucking companies, both DBE and non-DBE, that the Contractor and any of its subcontractors intend to use for hauling with respect to the Contract.

- b. This provided list shall include only those haulers with which the Contractor, or one of its subcontractors, has an agreement for the Contract (“Primary Haulers”). The Contractor shall advise INDOT’s PE/PS of any subsequent changes to the list of Primary Haulers.
- c. The Contractor must provide a copy of any written agreement or agreements it has with a DBE trucking company or companies to the INDOT PE/PS.
- d. Trucks from other haulers (“Supplemental Haulers”) may be used on the Contract to supplement the trucks available from the Primary Haulers. These Supplemental Haulers shall operate under agreements with the Primary Hauler.
- e. It is not necessary for INDOT to be given advance notification that a Supplemental Hauler shall be used; however, INDOT should receive such notice prior to submittal of the corresponding trucking report. INDOT’s district and field personnel understand that Contractors shall only have agreements with Primary Haulers.

2. Post Construction Requirements for DBE haulers only

- a. A DBE hauler participating must submit weekly trucking reports to EOD, Central Office Contract Compliance Section. The reports are to be completed by the DBE hauler, and record the payments received from the Prime Contractor and the distribution of payments the DBE hauler makes to haulers used to supplement its fleet. The trucking form is accessible from the following website:
<http://www.in.gov/indot/div/legal/dbe/pubs/DBETruckingReport.pdfreportdisclo0202>

3. Monitoring of Trucking Reports

INDOT EOD will review trucking reports submitted monthly by the District EEO Officers.

4. General Trucking Credit Policies

EOD uses the following guidelines for an accurate assessment of DBE goal attainment through the use of a DBE hauler. As such, 49 CFR 26.55(d) is incorporated as though fully set forth herein:

- a. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, including its dispatching, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

- b. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- c. DBE credit will be allowed for the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- d. The DBE may lease trucks from another DBE firm, including owner-operators certified as DBEs. DBE credit will be allowed for the total value of the transportation services the lessee DBE provides on the contract.
- e. The DBE may also lease trucks from non-DBE firms or non-DBE owners-operators. When a DBE leases trucks from a non-DBE, DBE credit will be allowed for the value of transportation service provided on the contract by trucks equal in number to the number of trucks used under subsections “c” and “d.” DBE credit will also be given for any fee or commission the DBE receives as a result of the lease arrangement for any additional non-DBE trucks.
- f. For purposes of counting under “c” and “d” above, the lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease when the truck is not needed by the DBE and with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

J. Removal of DBEs from DBE Eligibility or DBE Certification Revocation

- 1. When a prime contractor has made a commitment to use a DBE firm as noted on its AAC but a subcontract has not been executed before a DBE firm becomes ineligible, a prime contractor may not count that firm toward the contract goal and will be directed to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.
- 2. If a prime contractor has executed a subcontract with the firm before the firm has been notified of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward the DBE goal for the firm’s work. In this case, or in a case where a prime contract was let to a DBE later ruled ineligible, the portion of the ineligible firm’s performance of the contract remaining after the issuance of the notice of its eligibility shall not count toward INDOT’s overall goal, but may count toward the contract goal.
- 3. Exception: If the DBE’s ineligibility is caused solely by its having exceeded the business size standard or the personal net worth limitation during the performance of the contract, INDOT may continue to count its participation on that contract toward overall and contract goals.

4. DBEs that have had their certification revoked by INDOT and have requested in internal INDOT appeal remain certified throughout the internal appeal process.

VI. DBE Certification

A. Authority

INDOT is the sole certifying agency for the Indiana DBE Program and certifies for all transit authorities, Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Aviation Administration (FAA) as set forth in the State of Indiana's Unified Certification Program (UCP) as amended.

B. Overview

INDOT's EOD has a certification section comprised of a manager, certification coordinator and three certification specialists. Certification Specialists review DBE and ACDBE applications; evaluate relevant financial forms; conduct interviews to determine expertise and control; and perform on-site evaluations of firm facilities; to determine if each applicant meets the requirements as set forth in 49 CFR Part 26 Subpart D and 49 CFR Part 23 Subpart C which are incorporated by reference as though fully set forth herein. INDOT keeps all applicant financial documents confidential and does not release any such information without the applicant's written consent.

C. Qualifications for DBE Certification

1. Social and Economic Disadvantage. To qualify for certification as a DBE, a for-profit firm must be at least 51% owned by a socially and economically disadvantaged individual(s) who is a citizen of the United States or lawfully admitted permanent resident. The following classes are rebuttably presumed to be socially and economically disadvantaged under 49 CFR 26.67(a): Female, Black, Hispanic, Asian Pacific, Asian Indian, or Native American. While these groups have a rebuttable presumption of social disadvantage, any individual who can establish social disadvantage by a preponderance of the evidence, based on guidelines set forth in Appendix E to 49 CFR Part 26, may qualify. Individuals who do not belong to a presumptively disadvantaged group have the burden of persuasion that they are, in fact, socially and economically disadvantaged.

2. Personal Net Worth. The socially and economically disadvantaged owner must not have an individual personal net worth, excluding the value of the owner's primary residence and ownership interest in the firm, of more than \$750,000.

3. Control. The socially and economically disadvantaged individual must "control" the firm, meaning that he or she must have an overall understanding of, and managerial and technical competence and experience directly related to the type of business in which the firm is engaged and in the firm's operations.

4. Independence. The socially and economically disadvantaged owner must have operational and managerial control, and independence from non-DBE firms. The contributions of capital or expertise used to acquire ownership must be "real and substantial" and derived from individually and independently owned resources. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible even if the debtor's ownership interest is security for the loan.

Factoring method of financing does not raise any more concerns about a DBE firm's independence than does any other typical lending institution financing arrangement if the agreement sets forth the following provisions: the seller of the accounts receivable remains liable for the purchase price fronted by the factor through collateral or the rescinding of purchase funds; the debtors, or customers, are not guarantors of payments to the factor; there are only two parties at risk: the seller of the accounts receivable and the purchaser, or factoring institution. INDOT will require, a copy of the DBE's factoring agreement to ensure that there are no third party (e.g. prime contractor) guarantors that could compromise its independence.

5. Small Business Requirement. A DBE firm must be a small business. This means that a firm applying for DBE status may not have gross receipts, averaged over a three-year period, that exceed the Small Business Administration size standards associated with the specific type of firm. See 13 CFR Part 121. In no case, may a DBE firm's gross receipts averaged over a three-year period exceed \$20,410,000.00 million, or.

D. Qualifications of an ACDBE firm.

1. A firm applying for ACDBE certification must state that it is applying for certification as an ACDBE and comply with all application requirements set forth in 49 CFR §§26.61–91 and 49 CFR § 23.39 (g) and (h) which are incorporated by reference as though fully set forth herein.

2. Small Business Requirement.

- a. Generally. A firm applying for ACDBE status is eligible for certification if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$30 Million, or current limit as may be set by the U.S. Secretary of Transportation.
- b. Exceptions. Exceptions to this include:
 - i. Banks and financial institutions which may not have gross receipts averaged over the firm's previous three fiscal years over \$275 Million, or current limit as may be set by the U.S. Secretary of Transportation
 - ii. Car rental companies' gross receipts averaged over the firm's previous three fiscal years may not exceed \$40 Million, or current limit as may be set by the U.S. Secretary of Transportation
 - iii. Pay Telephone firms may not have greater than 1,500 employees to be eligible for ACDBE certification, or current limit as may be set by the U.S. Secretary of Transportation .

3. DBE Presumption of Eligibility. Firms certified as a DBE are presumed eligible to participate as an ACDBE if socially and economically disadvantaged owners control the firm with respect to its activity in the concessions program. Further, INDOT is not required to certify a DBE firm as an ACDBE firm if it does not do work relevant to the airport's concessions program.

4. DBE Certification Requirements 49 CFR §§ 26.83 (c)(2) through (c)(6) do not apply to ACDBE certifications. Instead the following steps are required:

- i. Obtain the resumes or work histories of the principal owners of the firm and conduct personal interviews.
- ii. Analyze stock ownership if it is a corporation.

- iii. Analyze the bonding and financial capacity of the firm.
- iv. Determine the work history of the firm, including any concession contracts or other contracts it may have received.
- v. Obtain a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive.
- vi. Obtain a statement from the firm of the type of concession it prefers to operate or types of other contracts it prefers to perform.
- vii. Eligibility of Alaskan Native Corporations do not apply under this part but are governed by 49 CFR §26.73(h).

E. Annual Affidavits Applicable to Both DBE and ACDBE Firms

Certified DBE/ACDBE are required to report any changes in their business structure to the EOD. In all cases, DBE firms must provide the EOD with an annual update of its business and financial structure, including any changes in the personal net worth of the owner. These updates are in affidavit form and must be accompanied by the owner's and firm's most recent tax returns. The EOD will investigate if information indicates a possibility that the firm may no longer qualify for the DBE program.

F. Recertifications of DBE and ACDBE Firms

INDOT relies upon the annual affidavits submitted by certified firms and does not wait until a three-year period elapses to analyze changes in certified firms that may affect certification. However, INDOT will use its best efforts to conduct an onsite investigation of each certified firm every three years.

G. Updated Certification Letters

INDOT, upon request by a certified DBE/ACDBE will issue a letter with the current date that states that the firm is still a certified DBE. This letter is not intended as nor should it be interpreted as a recertification. This letter is merely a confirmation by INDOT that the firm remains certified.

H. Certification Denial Appeals Applicable to Both DBE and ACDBE Firms

If the EOD determines that an applicant does not qualify for DBE status, the EOD will issue a certified letter to the applicant setting forth the specific reasons for the denial and applicable federal regulations. Should the EOD determine that an applicant does not qualify for DBE status, the applicant may appeal the decision to the USDOT within 90 days of the determination, pursuant to 49 CFR §26.89. The appellant has the burden of proof to show that the EOD was incorrect in its determination not to certify the firm. An applicant that does not exercise its right to appeal may re-apply with the EOD for certification no sooner than 9 months after the date of the EOD letter denying certification.

I. Recertification Denials Applicable to Both DBE and ACDBE Firms

If the EOD revokes a current DBE firm's certification status, the firm may request an appeal before an Administrative Law Judge (ALJ). INDOT uses attorneys from the Indiana Office of Attorney General trained in certification matters to preside as ALJs over decertification appeals. At a decertification denial or revocation hearing, EOD has the burden of proof to show that its determination to revoke certification was correctly

based upon federal regulations, 49 CFR Parts 26 and/or 23. After a hearing before the ALJ, both INDOT and the firm have further appeal rights with the Federal DOT.

Any DBE firm whose status has been revoked by the EOD shall remain certified and listed in the DBE directory until all internal INDOT appeal have been completed. Should the firm exercise its right to further appeal to U.S. DOT, pursuant to 49 CFR 26.87(i)(2), The EOD may remove the DBE firm from its DBE Directory of Certified firms. Should U.S. DOT overturn the INDOT revocation determination, INDOT will re-enter the firm in its DBE directory as may be instructed.

J. Certification Procedures

1. The EOD receives applications either by mail, courier, or personal delivery. The Administrative Assistant stamps the “Received Date” in the mid-section of Page 1 of the application on the day it is received.
2. The Administrative Assistant enters into an Excel spreadsheet, the name of the applicant company, the date the application was received by the EOD, and date the Administrative Assistant transfers the application to the Certification Coordinator. The Administrative Assistant must complete this process within one business day of application receipt by the EOD.
3. After receiving the application, the Certification Coordinator verifies whether the applicant has obtained their Business Registration Number (BRN).
 - a. If the BRN is not evident upon review of the application, the Certification Coordinator contacts the company via e-mail, phone, fax or mail to inform it that a BRN must be obtained within 7 business days before the EOD can process their application. The Certification Coordinator places a reminder in Outlook of the deadline and the file will be held for 10 business days allowing the applicant time to obtain the BRN. *
 - i. If the BRN is not obtained and communicated to the EOD by the 10th business day, the Certification Coordinator calls the applicant reminding it of the need for the BRN. After that call is made the applicant shall have one business day to email or fax a copy of its BRN to the EOD. If the EOD does not receive notification of the BRN within this time period, the Certification Coordinator sends a certified letter to the applicant, stating that the file was closed due to lack of information. The file will be given to the Administrative Assistant to be filed alphabetically under the status of “Closed – No BRN,” and the Assistant updates the “Incoming Applications” spreadsheet.
 - ii. If the BRN is received within the aforementioned deadline, advance to step 3.b.
 - b. If the BRN is provided timely, the Certification Coordinator logs the application into the DBE Directory/Repository by completing the Profile and Application pages within one business day of receipt. Applications are listed

with a status of “Pending” on the Applications page. Acknowledgement of receipt of application is noted on the Communication page and a letter acknowledging receipt is sent to applicant via e-mail, phone, fax or mail within one business day of receipt of a complete application or a BRN.*

4. The Certification Coordinator places the application and accompanying documentation in a folder according to the filing procedures. NOTE: See attached Filing Procedures within one business day of receipt of application with a BRN, or within one business day of receipt of BRN.
5. The Certification Coordinator reviews incoming applications to determine if all required documentation as identified on the EOD certification checklist has been provided. This review shall not assess the accuracy of the documents. If the application is deficient, the Certification Coordinator shall so document in the Repository and on the checklist. At this time, the Certification Coordinator shall forward the application onto the Certification Specialist within one business day of receipt of application with a BRN, or within one business day of receipt of BRN.
6. The Certification Coordinator assigns files evenly among the Certification Specialists and logs all activity in the Repository by submitting comments in the Communications Log.
7. If the application is deficient, the Certification Specialist requests via e-mail, fax, or certified mail that the applicant cure the deficiency so the file can be reviewed. The applicant has 7 calendar days from the date the letter is received to provide the additional documentation. The Certification Specialist files the applicant’s folder with the application in the filing cabinet for the 7 calendar days.
 - a. If requested documentation is not provided within the 7 calendar day period, the Certification Specialist notes their comments in the Repository on the Communication Log and sends the second request by e-mail, fax or certified mail (whichever request was not used the first time.)
 - b. If the applicant does not respond to the 2nd request within 7 calendar days of such contact, the Certification Specialist makes a 3rd and final attempt to reach applicant by whichever method that was not used before, allowing 7 calendar days from date of contact. The Certification Specialist will note this in the Repository on the Communication Log.
 - c. If requested documentation is not provided within this 7 calendar day period, the Certification Specialist will either write a letter closing the file or a letter of denial for lack of cooperation as determined in the sole discretion of the Certification Manager. This will be sent certified mail and signed by the Director.
8. Once the Certification Specialist has completed file for review, the specialist must complete the review with in ninety days. The certification may request a one-time extension of a period not to exceed sixty days upon written notice to the firm explaining in detail the reason for the need for the extension.

6. The Certification Specialist conducts a desk audit of the file.
7. After all requisite documentation has been received and evaluated, the Certification Specialist schedules a site visit with the Applicant (if it is an Indiana company). Otherwise, the site visit will be requested from the home state UCP.
8. The Certification Specialist conducts the site visit asking all questions and for the provision of documents as needed.
9. The Certification Specialist completes an Investigation Report, adds comments to Communications Log in the Repository, and attaches the Investigation Report to the Applications page in the Repository.
10. The Certification Specialist presents all findings/recommendations at the weekly Certification Review Committee meeting.
11. Once a decision is agreed upon by the Certification Review Committee, the Certification Specialist drafts an appropriate determination letter. The determination letter should include the initials of the Certification Specialist, the Certification Coordinator, and the Director.
12. The Certification Specialist updates the application status in the Repository.
 - a. If the applicant is **certified**, the Certification Specialist determines the NAICS Codes and the DBE Codes applicable to the company's products/services. The Certification Specialist logs the NAICS and DBE codes into the Repository on the Application page.
 - b. If the applicant is **denied**, the Certification Specialist enters the denial reason(s) into the Application page and the Communication log (use 49CFR codes).
13. The Certification Specialist delivers the completed file to the Certification Manager and emails him the determination letter with a copy to the Director.
14. The Certification Manager reviews the file, gives the letter to the Director for signature and returns the file to the Certification Coordinator to note in the Communication Log.
15. The Certification Coordinator copies the signed letter for placement in the folder then mails the letter to the applicant by certified mail and notes the date letter is being sent in the Communication Log within one business day of receipt of file.
17. INDOT accepts out of state certification applications for DBE firms certified in their home state. INDOT will review the applications independently, however, regardless of the certification determination of the home state. INDOT will

request a copy of the on-site investigation from the applicant's home state and will accept the onsite as current if it is under three-years old.

18. If a firm applying for certification has a current, valid certification form or is recognized by the Small Business Administration (SBA) under the 8(a) small business program, INDOT will accept its 8(a) application instead of a DBE application and all documents relevant to the SBA determination. INDOT will however, ask for additional documentation, if necessary, to make an appropriate determination concerning the firm's DBE status.

K. DBE Certification File Procedures.

The Certification Section shall follow the procedures set forth below in organizing and maintaining DBE files;

Inside Front Cover – Certification Checklist

Section 1 – Regional Director's Notes & Correspondence

- Letters to the vendor from EOD (Note: Most recent cert or denial letter must always be on top).
- Pertinent information for the onsite coordinator.
- Miscellaneous documents.

Section 2 – Original Application

Section 3 – Personal Information

- Birth/Ethnicity/Legal Permanent Residence.
- Resume.
- Relevant Licenses.

Section 4 – Operational Documents

- Lease Agreements
- Insurance Binders
- Equipment Rental
- Vehicles Titles/Leases
- Loan Agreements/Promissory Notes

Section 5 – Ownership Documents

- Articles of Incorporation
- Bylaws
- Stock Certificates
- Minutes of Board & Shareholder's
- Bank Signatory Cards
- Schedules of Salaries

Section 6 – Financial Documents

- Initial Contribution
- Personal Net Worth Statement

Inside Back Cover – Tax Information

- Income Statements/Balance Sheets
- Federal Personal Taxes
- Corporate Taxes

Financial records and documents marked “CONFIDENTIAL” will be filed chronologically with the most recent year on top.

L. Third Party Complaints Pertaining to DBE and ACDBE Firms

Overview: EOD Certification Specialists perform investigations in response to third-party complaints of DBE ineligibility or fraud in accordance with 49 CFR 26.87 incorporated by reference as though fully set forth herein. The EOD reviews only written complaints that set forth specific allegations of DBE ineligibility. INDOT may choose whether or not to review an anonymous written complaint.

EOD Certification Manager tracks the receipt and progress of its investigations and will make every effort to complete third-party complaint investigations within sixty days of receipt.

Procedure: The following sets forth the internal procedure and policy for receiving and investigating 3rd Party Complaints:

1. Complaints accepted in writing only, which must be signed by the complainant.
2. The Division will respond with an acknowledgement correspondence noting the receipt of the complaint that contains the following:
 - a. Investigation of certified firms only.
 - b. Summary of the investigation process.
 - c. Provide the complainant with a Complaint Form.
 - b. The Form must be signed/ notarized and returned to the Division within 7 business days.
3. Upon receipt of the Complaint Form the Division notes the official filing date and logs complaint into Third Party Complaint Database.
4. Complaint Form is discussed with Certification Review Committee which determines if the substance of the complaint causes investigation to be appropriate.
5. The Certification Review Committee will produce an action plan.
6. The EOD will then issue an official response to the complaint with correspondence accepting or denying the DOD’s responsibility to investigate.
7. If warranted, an investigation will commence.

- a. The investigator shall interview the complainant.
 - b. Within 14 days of filing date, the investigator shall:
 1. Identify witnesses and comparators
 2. View evidence.
 - c. The investigator shall conduct a fact- finding conference with the reviewing committee.
 - d. The investigator shall submit a summary of the investigation and:
 1. Discuss the case with the review committee.
 2. Obtain the signature authorization from the Director, who will submit these written findings with FHWA.
8. Confidentiality

INDOT recognizes that, in responding to requests for information concerning any aspect of the DBE program, the U.S. Department of Transportation will comply with the provisions of the Federal Freedom of Information and Privacy Acts and that any information concerning the DBE program, release of which is not prohibited by Federal law, may be made available to the public. INDOT will safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

Notwithstanding the above, INDOT shall keep the identity of complainants confidential, at the election of the complainant. However, if such confidentiality will hinder the investigation, proceeding, or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant will be advised for the purpose of waiving the privilege. INDOT will advise complainants that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.

APPENDIX

Economic Opportunity Division Forms

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